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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1030 65

CRESCENT EXPRESS LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

GEORGE H. ROSEN,
Counsel for Appellant.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-339

CRESCENT EXPRESS LINES, INC.,
Plaintiff,

against

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, plaintiff submits herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain this direct appeal to review the decree and judgment rendered herein.

(A) The Statutory Provisions Believed to Sustain the Jurisdiction.

The statutory jurisdiction of the Supreme Court to review by direct appeal the decree and judgment complained of is conferred by:

Section 210 of the Judicial Code, Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, U. S. C. A. Title 28, Section 47a.

(B) This action does not involve the validity of any statute of any state or of any statute or treaty of the United States.

(C) The Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The decree and judgment sought to be reviewed was dated February 27, 1943 and filed and entered in the above entitled action on March 6, 1943.

The petition for appeal herein was presented and filed on April 16, 1943.

(D) Statement Showing That the Nature of the Case and the Rulings of the Court Were Such As to Bring the Case Within the Jurisdictional Provisions Relied Upon.

On September 2, 1941, Division 5 of the Interstate Commerce Commission made its order for a certificate under the grandfather clause of Section 206 (a) of the Motor Carrier Act of 1935 as amended, and which said order, although granting rights to the plaintiff, did restrict and limit the said rights illegally and improperly as plaintiff claims and as more fully set forth hereinafter.

That thereafter objections were duly filed by the plaintiff against the order of September 2, 1941 but the said Commission by Division 5 made its order dated March 17, 1942 denying the same. That thereafter an application was made by the plaintiff for reconsideration by the entire Commission but the Interstate Commerce Commission denied said petition for reconsideration or hearing by order dated July 13, 1942.

On September 9, 1942 an action was instituted by the plaintiff in the United States District Court for the South-

ern District of New York to vacate, annul and set aside the said order of the Interstate Commerce Commission upon the ground that the same was granted improperly and illegally and to reinstate a prior order made by the Commission dated June 20, 1938 which properly described the rights to which the plaintiff was entitled. Plaintiff secured leave to serve an amended complaint and issue was joined thereon. On January 14, 1943 the case was argued before a Statutory Court consisting of one Circuit Court of Appeals Judge and two District Court Judges, upon the record made before the Interstate Commerce Commission.

That thereafter the said Statutory Court rendered its opinion, a copy of which is annexed hereto. Thereafter the Court made its Findings of Fact and Conclusions of Law and Decree and Judgment, both dated February 27, 1943 and both filed in the office of the Clerk of the said District Court on March 6, 1943, wherein and whereby the said amended complaint was dismissed with costs. A copy of the said Decree and Judgment and Findings of Fact and Conclusions of Law are attached hereto marked Exhibits "A" and "B".

The rulings of the Statutory Three-Judge Court which heard the case were such as to bring the case within the jurisdictional provisions relied upon because such rulings dismissed the action on the merits and said Decree and Judgment denied to the plaintiff the relief sought in the said action.

The following cases are believed to sustain the jurisdiction of the Supreme Court:

U. S. v. *Maher*, 307 U. S. 148;

Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125;

U. S. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

(E) Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial.

This appeal presents for determination the following:

An interpretation of Section 203 (a) subdivision 13 of the Motor Carrier Act of 1935, (which was amended on June 29, 1938 and reenacted in the Interstate Commerce Act of 1940; U. S. Code Title 49 Sec. 303).

An interpretation of Section 206 (a) of the Motor Carrier Act of 1935, (which was amended on June 29, 1938 and reenacted in the Interstate Commerce Act of 1940; U. S. Code Title 49 Sec. 306).

An interpretation of Section 207 (a) of the Motor Carrier Act of 1935, (reenacted in the Interstate Commerce Act of 1940; U. S. Code Title 49 Sec. 307).

An interpretation of Section 208 (a) of the Motor Carrier Act of 1935, (reenacted in the Interstate Commerce Act of 1940; U. S. Code Title 49 Sec. 308).

This appeal also presents the question of whether the Commission has the right to restrict the plaintiff under the above provisions to any particular type of motor vehicle such as small cars, and in the absence of such authority whether the Commission can do so indirectly, by restricting the plaintiff from transporting more than six people at any one time regardless of the size of vehicle used.

The appeal also presents the question of whether the Commission has the right to limit the plaintiff to door-to-door service, irregular routes, non-scheduled operations and to an alleged description of such operations as special operations. The question of the Commission's power under Sections 206, 207 and 208 of the Motor Carrier Act are brought in question and the extent of the power of the Commission requires a final determination.

The appeal also presents the question of whether the Commission had the right to vacate the order of June 20, 1938 wherein the Commission properly granted the rights

to which the plaintiff was entitled, and granted the order of September 2, 1941 vacating such rights, without any procedure or evidence to sustain the order of September 2, 1941.

Facts.

This action has been instituted by plaintiff to set aside, vacate, annul and enjoin an order of the Interstate Commerce Commission dated September 2, 1941, whereby the said Commission by Division 5 granted to plaintiff certain "grandfather" rights but which plaintiff claims were too limited as more fully set forth herein; and which limitations were unlawful and in excess of the statutory power of the Commission.

Plaintiff is entitled to grandfather rights because it or its predecessors operated on and after June 1, 1935 the "grandfather" date, and under Section 206 (a) of the Motor Carrier Act of 1935 applicable thereto, a certificate had to be issued. The order of September 2, 1941 granted a certificate but limited the rights granted. This action raised the question of whether the form and extent of the certificate granted by the Commission was correct and whether the Commission had the power to restrict the rights granted in the manner complained of.

The Commission, after investigation, issued a compliance order dated June 20, 1938 which properly described the certificate to which plaintiff was entitled and was based on the evidence before the Commission. An order similar to the said order of June 20, 1938 had been issued previously on May 7, 1938 and was reissued as the order of June 20, 1938.

After the lapse of over three years the Commission without any further evidence, investigation or hearings issued a new compliance order dated September 2, 1941 which is the subject of the action.

For many years plaintiff's predecessors conducted operations between various points in Sullivan and Ulster Coun-

ties, New York and New York City, transporting passengers for hire. In October 1940, plaintiff purchased these rights and was substituted as successor in interest pursuant to the rules and regulations of the Interstate Commerce Commission and the statute applicable thereto.

Plaintiff objects to the order of September 2, 1941 in the following respects, to wit,

1. The limitation of the operating rights so that plaintiff should transport not more than 6 passengers in any one vehicle, not including the driver thereof and not including children under 10 years of age who do not occupy a seat or seats.

2. To the limitation to door-to-door service.

3. To the limitation to irregular routes.

4. To the limitation to non-scheduled operations.

5. To the limitation or description of the rights as special operations.

The scope of the operations conducted by the plaintiff and its predecessors consisted of transporting passengers from New York City to various points in Sullivan and Ulster Counties in the mountain area. These points are within the State of New York and vehicles traversed the State of New Jersey for convenience only. Vehicles operated daily during the seasonal period authorized carrying passengers in both directions. Individual passengers were sold individual tickets the same as any railroad transports individual passengers. Vehicles left New York City via bridge or tunnel and then travelled to Suffern and Route 17 in New York State, along Route 17 to Monticello, Liberty and Roscoe, in Sullivan County, and from Wurtsboro along Route 209 to Ellenville, Napanoch and Kerhonkson, in Ulster County. The same route was used when vehicles left the mountains going to New York City.

Argument.

Plaintiff contends that the Commission has no statutory power to limit plaintiff from using any type or size of motor vehicle which it desires to use, and that the statutes applicable expressly give plaintiff that right and expressly limit the Commission's power to restrict such right.

At the outset, plaintiff states that it used motor vehicles in its operations. These vehicles were of the sedan or limousine type seating 7 persons. The order of June 20, 1938 did not restrict plaintiff to any particular type of motor vehicle directly or indirectly. The order which is the subject of this action has ignored the statute applicable in making the restriction prohibiting the plaintiff from transporting more than 6 persons at any one time.

Section 203 (a), Subdivision 13, of the Motor Carrier Act of 1935 defines a motor vehicle as follows:

> "(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails."

Section 208 (a) of the Motor Carrier Act of 1935 provides as follows:

> "Any certificate issued under sections 206 or 207 shall specify * * *: *Provided, However,* That no terms conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

It is to be noted that the restriction made by the Commission in the order of September 2, 1941 does not prevent

plaintiff from using any kind or type of vehicle but merely restricts plaintiff from transporting more than 6 passengers in the vehicle used. This is very peculiar because it permits the plaintiff to use a bus seating 40 people but prevents the plaintiff from filling the seats in excess of the maximum 6. Inherent in the very restriction is the recognition that the type or size of vehicle could not be limited or restricted as set forth in Section 208 (a) of the Act. The Commission has attempted to circumvent the statute by preventing the transportation of more than 6 persons at one time.

The question, therefore, is very simple; that is whether the Commission has the right to do indirectly what it could not do directly. This proposition of law is so elementary that no citation of authority is needed. The law itself specifically recognized that all motor driven vehicles should be treated alike and to prevent any restriction of the use of different or larger type vehicles made the definition of a motor vehicle all inclusive so as to cover all types of motor vehicles.

The lower court went beyond the Commission's order and held that under Section 208 (a) that the limitation must be read "quantitatively". The lower court held that the plaintiff could add as many vehicles of the same type as it wished and in that manner construed the limitation under Section 208 (a) (U. S. Code Title 49 Sec. 308 (a)), although there is nothing in the statute which justifies the construction that plaintiff is to be confined to the precise type of vehicle that it used on June 1, 1935. The lower court has added to the clear phraseology of the statute a restriction not therein contained. The Commission itself, in the order of September 2, 1941 authorized the transportation of not more than 6 people at one time without regard to the size of the vehicle used. Plaintiff's position is therefore that the lower court misconstrued the statute and misunderstood the meaning of the order made by the Commission. The

lower court was in error in interpreting Section 208 (a) as merely giving the plaintiff unlimited right to add the identical type vehicles when the statute itself expressly prohibits any restriction upon a carrier adding to its equipment and facilities.

The effect of the decision of the lower court and of the order of the Commission is discriminatory. A freight operator using 1-ton trucks on June 1, 1935 is permitted to add larger vehicles to its equipment such as 8 and 10-ton trucks whereas a passenger carrier is frozen to the precise type of equipment used on June 1, 1935. This is without any statutory authority and is contrary to the express wording of Section 208 (a), the statute in question.

As will be indicated post, the lower court ruled that one of the other limitations placed on plaintiff's certificate, to wit, door-to-door service, permitted the plaintiff to pick up passengers at various stations. This results in a very impractical situation. If plaintiff wishes to take 36 passengers from a given station in New York City to a given station in the mountain area, to wit, Monticello, plaintiff will have to operate 6 individual cars with 6 individual drivers instead of placing all of the 36 passengers on one vehicle going from the particular station in New York to the particular station at Monticello. Such a result is a privilege which the plaintiff has the right to exercise and plaintiff is not confined to using 6 individual cars instead of one large vehicle to accommodate the 36 passengers. The use of such a larger vehicle does not improve the quality or change the type of service, but merely is a convenient, economical and expeditious way of transporting 36 people in a single vehicle between the two stations indicated. There is no more justification for the Commission trying to freeze the plaintiff so that no more than 6 passengers are transported at any one time than there is for the lower court to go beyond the Com-

mission's decision and try to freeze the plaintiff to the use of a specific type of vehicle.

In *United States of America* and *Interstate Commerce Commission* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 the Court said at page 488:

> "Its prior opportunity should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior activities as was done here not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights."

See also

Alton R. R. Co. v. *United States*, 315 U. S. 15.

The five additional limitations set forth supra are contrary to Section 206 (a) and Section 208 (a) of the Motor Carrier Act of 1935. Section 206 (a) states that a grandfather operator is entitled to a certificate because of having operated on June 1, 1935 over the route or routes or within the territory and does not place any restriction or limitation beyond those indicated. Section 208 (a) states that a certificate authorizing the service to be rendered shall specify the service and the routes or the territory. Nothing contained in either of those two sections indicate the limitation to door-to-door service, or scheduled or non-scheduled service and the inclusion of those two restrictions in the order of September 2, 1941 is unjustified. This is particularly so in view of the Finding of Fact numbered "3" and the Conclusion of Law numbered "3" and the opinion of the lower court that plaintiff may pick up passengers at any station. If by door-to-door service is meant any service, station or door service, then the restriction is utterly meaningless and should be eliminated. There is nothing

in the statute which justifies a limitation to non-scheduled service because the statute prescribes that service authorized shall be over route or routes or within a territory and the inclusion of the limitation of non-scheduled operations is without statutory authority. The Commission did not include any restriction with respect to non-scheduled operations in the following cases:

Alfred Koopman, MC 95430, Charles Filler, MC 96100, Samuel Schick, MC 95407, Ben Friedman, MC 95431 and *George Greenberg, MC 95349.*

The limitation set forth in the order of the Commission of September 2, 1941 to irregular routes is illegal and void because plaintiff's operations were over regular routes and the Finding of Fact numbered "4" made by the lower court clearly states that fact. The distance between New York and Wurtsboro is about 85 miles and the total distance from New York to Monticello is only about 96 miles. The greater portion of plaintiff's route having been found to be over a regular route, the restriction to irregular routes is without evidence to support same and is directly contrary to the evidence. The order of June 20, 1938 properly described the routes to which plaintiff was entitled. The statute authorizes the issuance of a certificate over regular routes or within a territory and there is nothing to justify a restriction to irregular routes. Such a restriction or authorization would apply to a charter operator and not to an operator such as the plaintiff transporting passengers between two given points in daily service.

The limitation or description of plaintiff's operations as special operations is ambiguous and void. The words "special operations" do not apply to the plaintiff. The Commission itself used the terminology of special operations as meaning charter operations under Section 207 (a). In the

case of *Peninsula Transit Corp.*, 1 M. C. C. 440, 442 the Commission held that special or charter operations mean:

> "Only those common carriers of passengers who are engaged, or propose to engage exclusively in the transportation of special or chartered parties are required to obtain a certificate specially authorizing such operations."

The *Peninsula* case differs from the case at bar because plaintiff charges individual fares to each passenger going to a different destination, and passengers do not charter the entire vehicle.

In the *Red Star Sightseeing Lines, Inc.*, 1 M. C. C. 521, the Commission held with respect to special operations that (p. 525):

> " * * * we conclude that the proposed sightseeing and pleasure tour operations of applicant are special operations within the meaning of that term as used in the proviso to Section 207 set forth above."

At Page 526 the Commission said:

> "We find that the present and future public convenience and necessity require the issuance of a certificate to applicant authorizing it to operate as a common carrier by motor vehicle, in special operations for the transportation in interstate or foreign commerce of passengers and their baggage on round-trip sightseeing or pleasure tours over irregular routes beginning and ending at Broadway and Palmetto Street, Brooklyn, N. Y., with no pick-up or discharge of passengers or baggage at any point * * *".

In the *Red Star* case every one went on the same tour or pleasure trip, starting out and returning together, but the plaintiff in the case at bar does not conduct that type of business. Plaintiff sells tickets to individuals, takes passengers going to different destinations in the same vehicle, takes

passengers in one direction and other passengers in the reverse direction, operates several times daily, and in fact carriers on a regular common carrier business which in no respect falls under the attempted description of "special operations".

The Commission in the Case of *John G. Schuster MC 106*, decided November 10, 1942 found with respect to seasonal operations that applicant was a common carrier entitled to operate:

> "* * * in special operations on round-trip sightseeing or pleasure tours beginning and ending in Shenandoah, East Mines, * * * with no pickup or discharge of passengers and baggage en route, * * *".

It is therefore obvious that the term "special operations" does not apply to the plaintiff because plaintiff conducts regular common carrier operations between New York City on one hand and various points and places in Sullivan and Ulster Counties, New York on the other. Special operations as construed in the *Red Star* case supra and in the *Schuster* case supra creates confusion and would mean that plaintiff would have to conduct round trips sightseeing tours which is not the type of business plaintiff is engaged in.

The lower court herein interpreted the meaning of the words special operations as set forth in its opinion as meaning the same thing as operations not over specified routes i. e. operations within a defined territory not upon regular routes or between fixed termini. The Commission's interpretation of special operations as indicated above means charter operations so that the plaintiff is confronted with a situation where it is uncertain of the meaning of the words "special operations" and in any event, plaintiff's operations are not special operations

because plaintiff conducts and has conducted a common carrier business transporting passengers in both directions, with individual tickets. The lower court in its opinion states in Finding of Fact numbered "6" that notice was given to the plaintiff of a new hearing but in the certified transcript of the record procured by the plaintiff and submitted to the court, there was no proof as to such notice; and in the opinion of the lower court the court said that there was nothing improper in the procedure adopted by the Commission in changing its decision. It should be noted that the order of June 20, 1938 was made by Division 5 and the order of September 2, 1941, which is the subject of this action, was made by Division 5 and there was no justification for the change made by said Division 5 of the Commission without any evidence to support the same. The said Finding of Fact numbered "6" finds the fact that there wasn't any additional evidence to support the order of September 2, 1941, so that plaintiff's position is that the making of the order of June 20, 1938 by the Commission by its Division 5 should stand in the absence of any proof given by the protestants, or otherwise, and that the order of September 2, 1941 was not based upon proper procedure or legal evidence to support same.

The Commission did not make any findings of fact to justify the order of September 2, 1941 and the absence of proper findings of fact requires that the said order of September 2, 1941 be vacated and set aside and to that end, that the Decree and Judgment of the lower court be reversed.

State of Florida v. *United States*, 282 U. S. 194, 215;
United States v. *Chicago, Milwaukee, St. Paul R. R. Co.*, 294 U. S. 499, 504;
Wichita R. R. Co. v. *Public Utilities Commission*, 260 U. S. 48, 58;

Atchison Railway Co. v. *United States*, 295 U. S. 193, 201;

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

Copies of the findings of fact, conclusions of law, the decree and judgment and opinion of the Statutory Court, and the orders of the Interstate Commerce Commission dated September 2, 1941 and June 20, 1938, are attached hereto.

Respectfully submitted,

GEORGE H. ROSEN,
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Office & P. O. Address,
302 Broadway,
Borough of Manhattan,
City of New York.

EXHIBIT "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 19-339.

CRESCENT EXPRESS LINES, INC., *Plaintiff*,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

—and—

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION, *Intervenors*.

Before: L. Hand, Circuit Judge and Caffey and Hulbert, District Judges.

This cause came on to be heard at the January, 1943, term of this court, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, Adjudged and Decreed, that the amended complaint herein be, and the same hereby is dismissed upon the merits with costs.

Dated, February 27th, 1943.

LEARNED HAND,
United States Circuit Judge.
FRANCIS G. CAFFEY,
United States District Judge.
HULBERT,
United States District Judge.

EXHIBIT "B".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 19-339

CRESCENT EXPRESS LINES, INC., *Plaintiff*,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

—and—

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION, *Intervenors*.

The Court makes the following findings of fact and conclusions of law.

Findings of Fact.

1. The plaintiff was carrying passengers by motor for hire on June 1, 1935, and thereafter from New York City through New Jersey to points and places in Sullivan and Ulster Counties, New York.

2. Its route was from the Borough of the Bronx over the Washington Bridge, thence by Routes 4 and 2 in New Jersey and Route 17 in New York, to Wurtsboro whence it delivered its passengers within 20 miles of Woodbourne, New York.

3. The plaintiff carried its passengers in both directions daily during the season authorized, but only in cars such as those described in the eighth finding, picking them up at their houses and dropping them at their hotels or boarding houses; and vice versa. In some cases it picked them up at an "office" at 531 East 169th Street, in the Bronx, or at a fixed station in Woodbourne.

4. That part of the route which was between New York and Wurtsboro was always over the same roads.

5. The plaintiff's operations were not upon any schedule.

6. Before changing the certificate granted on June 20, 1938, the Commission gave notice to the plaintiff of a new hearing, but it did not take any additional evidence to support the order of September 2, 1941.

7. The certificate issued on September 2, 1941 truthfully "specifies" the service rendered by the plaintiff and its predecessors as of June 1, 1935.

8. The certificate restricts the plaintiff to the use of cars, capable of carrying not more than six passengers, not including the driver and children under 10 years of age who do not occupy a seat or seats.

Conclusions of Law:

1. The order of September 2, 1941 was adequately supported by evidence.

2. The Commission lawfuly restricted the equipment and facilities of the plaintiff in accordance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935.

3. The restriction in the certificate upon plaintiff's service to non-scheduled operations was lawful; so too was the certificate's description of the authorized route as "special" and "irregular"; and the service as "door-to-door"; but the last description does not forbid the plaintiff from picking up passengers at 531 East 169th Street in the Bronx, or at any fixed station in Sullivan County, or at any other station.

4. The amended complaint should be dismissed upon the merits with costs.

Dated, February 27th, 1943.

LEARNED HAND,
United States Circuit Judge;
FRANCIS G. CAFFEY,
United States District Judge;
HULBERT,
United States District Judge.

EXHIBIT "C".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 19-339.

CRESCENT EXPRESS LINES, INC., *Plaintiff,*

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

—and—

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION, *Intervenors.*

Before: L. Hand, Circuit Judge, and Caffey and Hulbert, District Judges.

Upon final hearing before a court, convened under Sec. 47 of Title 28, U. S. Code, of an action brought under Sec. 41 (28), Title 28, U. S. Code, to set aside an order of the Interstate Commerce Commission.

George H. Rosen, for the plaintiff.

Robert L. Pierce, for the United States.

E. M. Reidy, for the Interstate Commerce Commission.

James F. X. O'Brien, for Hudson Transit Lines, Inc., Intervening.

Henry P. Goldstein, for Mountain Transit Corp., Intervening.

L. HAND, *C. J.:*

This cause comes on before a court, convened under Sec. 47 of Title 28, U. S. Code, for final hearing of an action brought under Sec. 41(28) of Title 28, U. S. Code, to set aside an order of the Interstate Commerce Commission, and thus to reinstate its earlier order which the order appealed from modified. The plaintiff is a common carrier by motor, a corporation which succeeded to a partnership from which

we need not distinguish it. On June 1, 1935, it was operating a fleet of six sedan motor cars, each capable of seating seven persons—six passengers and the driver—between New York City, (chiefly from the Borough of Bronx), and points in Ulster and Sullivan Counties, over a route, part of which was in New Jersey. On February 12, 1936, it filed an application with the Commission under Sec. 306(a) of Title 49, U. S. Code, (the "Grandfather Clause" of the Motor Carrier Act of 1935), for a certificate authorizing it to continue this service, which on March 26, 1937, it supplemented by a more formal application, accompanied by supporting affidavits. A protest against the grant of such a certificate having been made, the case came on for hearing on November 30, 1937, at the New York district office of the Commission and proofs were taken. On May 7, 1938 the Commission entered an order, which it modified in unessential details by a second order entered on June 20, 1938, which is the order that the plaintiff wishes reinstated. This order awarded a certificate to the plaintiff which described the service to be rendered as being "over the regular route, between fixed termini, and to and from intermediate and off-route points" for four summer months "between New York, N. Y. and Woodbourne, N. Y.". After specifying the route in detail the certificate concluded: "Intermediate and off-route points within 20 miles of Woodbourne." Protests against this order were at once filed by a number of bus lines and the matter was referred back to the division for further investigation. Notice of a further hearing for December 1, 1938, was given, at which however no new evidence was taken, and which the plaintiff apparently did not attend. The Commission, having before it many applications involving the "Grandfather Clause", and being divided as to its meaning, withheld decision until September 2, 1941, when it superseded its certificate of June 20, 1938, and granted another in the following terms:

"The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in nonscheduled door-to-door service, limited to the transporta-

tion of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

"Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenberg, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only."

The plaintiff, which had been satisfied with the first certificate, objected to the second, and, after two petitions for rehearing had been denied, (one addressed to the division which had issued the certificate, and the other to the whole Commission), brought this action on September 30, 1942. The amended complaint alleged that the second certificate was unlawful, because it should not have limited the plaintiff in five particulars: 1.) to vehicles carrying only six passengers and the driver; 2.) to "door-to-door service"; 3.) to "irregular routes"; 4.) to "non-scheduled" service; 5.) to "special operations." In addition the complaint challenged the power of the Commission to modify the certificate of June 20, 1938, without taking further evidence, and holding another hearing. Answers having been filed, the cause came on for hearing upon the pleadings and the record of the proceedings before the Commission.

The case turns upon three sections of the Motor Carriers Act, (Secs. 306, 307 and 308 of Title 39, U. S. Code), which subject "common carriers"—as distinct from "contract carriers", (Sec. 309)—generally to the control and regulation of the Commission by requiring them to obtain certificates of "public convenience and necessity", similar to those required of common carriers by rail for extensions of their lines, (Sec. 1(18), Title 49, U. S. Code). The proviso to Sec. 308(a), upon which the plaintiff must rely for the scope which it claims for its certificate, applies to all certificates granted to "common carriers" under Sec. 307(a), whether under the "Grandfather Clause", or otherwise; and it will be clearer to consider the Commission's

powers as a whole before taking up that clause itself. After giving general superintendence over the subject-matter to the Commission by Sec. 306(a), Congress in Sec. 307(a) directed it to issue certificates, when these are "required by the present or future public convenience and necessity." The section concludes with a proviso which limits such certificates, in the case of passenger carriers, to "regular * * * routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations." Section 308(a) defines what shall be the contents of such certificates: they must "specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in the case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." (We interpret "special * * * operations" in the proviso to Sec. 307(a), as meaning the same thing as "operations not over specified routes," just quoted from Sec. 308(a): i. e. operations within a defined territory not upon regular routes, or between fixed termini). Finally, Section 308(a) makes "the exercise of the privileges granted" by a certificate subject, both at its issue and at any later time, to "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require."

Thus it appears, not only because the certificate is to "specify the service to be rendered" as well as the routes over which it shall be rendered, but also because that service is to be always subject to regulation in the interests of the public, that Sec. 308 (a)—unless because of its proviso—, leaves complete regulatory power in the Commission's hands. That proviso does, however, set a limit upon its power, and the result at bar depends upon what that is. It declares that none of the "terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require." The parties at bar appear to assume that this is more than merely a direction for the guidance of the Commission; and that, ex proprio vigore, it gives the carrier the privilege

without recourse to the Commission of adding to his service as he may find it desirable to do so. That is indeed probably its true meaning: in any event we shall assume so for the purpose of this case, for in any event it must be read quantitatively. As we have already observed, the Commission must not only prescribe the route over which the carrier shall operate, but it must also "specify the service to be rendered." No one suggests that the proviso to Sec. 308(a) authorizes the carrier to change the prescribed route, and there is as little reason for saying that it justifies a change in the service to be rendered. Unless that feature of the certificate is to become a dead letter, and the Commission is to be stripped of all power except to fix routes, the carrier cannot have power substantially to modify the quality of his service, however free he may be to "add" to it in amount; and certainly nothing can more directly touch the quality of transportation than the cars in which passengers are carried. Indeed, limitation as to the quality of the service was inevitable in the public interest: a line of light small passenger cars—like those here at bar—may be desirable however numerous, over routes upon which a fleet of powerful, heavy, commodious, motor busses, capable of seating forty or fifty passengers, and weighing perhaps ten tons, would be wholly unsuitable.

The proviso in Sec. 306(a)—the "Grandfather Clause"—was apparently inserted to avoid the hardship which would result from forcing a carrier to justify his existing business in terms of public convenience. It was meant to accept the motor vehicle system as it was; it recognized as vested such rights as had grown up before Congress asserted any public interest in motor transportation; and consistently, the rights protected should be measured by past user. Strictly, it was therefore an anomaly to give carriers who secured certificates under the "Grandfather Clause", the privilege of indefinite quantitative expansion. The only reason for dispensing with the Commission's supervision—i. e. the injustice involved in stopping a business which had grown up in reliance upon the failure of Congress to act—ceased with the protection of the business as it stood when regulation began; and possibly Congress did not realize

that it was going as far as it did. Be that as it may, if the holders of such certificates have the same unlimited power to change the quality of their service as they have to add to its quantity, Congress, in an effort to prevent the unduly harsh impact of a new system, created a favored group of carriers, substantially free from all regulation over those routes on which they may have chanced to operate on June 1, 1935. So far at least, it is safe to say that Congress did not mean to go.

It follows from what we have just said that all those limitations of which the plaintiff complains were properly imposed upon its certificate, for all served to "specify the service to be rendered". There can be no debate about the first, which confines the service to cars holding only seven persons. The second, describing the business as a "door-to-door service", is not to be understood as preventing the plaintiff from picking up passengers either at No. 531 East 169th Street in the Bronx—said to be its New York "office"—or at any fixed place in the village of Woodbourne or elsewhere; and when so understood, the description is accurate, for it does do a "door-to-door" business. The Commission is certainly not limited to the exact words of the statute; it could not properly "specify" the service at all, if it were. Third: it was also proper to describe the route as "irregular". A "regular" route means one which has only "fixed termini", not one which always traverses the same roads for part of its route. The fact that the plaintiff picks up and sets down its passengers at places of their own choosing make its whole route "irregular". Its professed fear that its privilege of passing over the same roads between the Bronx and Wurtsboro may be forfeited is altogether fanciful. Fourth: the service was properly described as "non-scheduled", for such it is; if the plaintiff wishes to run on a schedule, it must apply to the Commission for a change. Fifth: the operation was "special" for that word—borrowed from the proviso in Sec. 307(a)—is used, as we have already indicated, in contrast with a "regular" route "between fixed termini".

Finally, we can see nothing improper in the procedure adopted by the Commission in changing its decision; it

acted upon the same record and after notice to the plaintiff of a new hearing. True, the interval between the orders were long; but the whole subject was new and confused, and the Commission itself was divided in opinion. The plaintiff was deprived of no right, substantial or procedural, and indeed does not even now allege that any other evidence would have changed the result.

The amended complaint will therefore be dismissed: findings and a judgment are filed herewith.

Complaint dismissed.

EXHIBIT "D".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 2nd day of September, A. D., 1941.

No. MC 78980

APPLICATION OF CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity upon compliance with the terms of the said order; that protests or exceptions to said order having been duly filed; and further consideration having been had;

It further appearing, That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216 and 217 of the Interstate Commerce Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, and upon filing appropriate publications providing for the cancelation of any effective rates or charges applying to transportation service in excess of that herein or otherwise lawfully authorized, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with

the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

[SEAL.] W. P. BARTEL, Secretary.

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 2nd day of September, A. D. 1941.

No. MC 78980

APPLICATION OF CRESCENT EXPRESS LINES, INC.,

NEW YORK, NEW YORK.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in nonscheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1, to October 1, inclusive, over irregular routes, is as specified below:

Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

EXHIBIT "E".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 20th Day of June, A. D. 1938.

No. MC 78980

APPLICATION OF HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, AND MORRIS GLICKMAN, A PARTNERSHIP, DOING BUSINESS AS CRESCENT MOUNTAIN SERVICE, BRONX, NEW YORK.

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby denied, *and that on and after 30 days from date of this order*, unless on the Com-

mission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceeding.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with the requirements therein specified, be and it is hereby vacated and set aside.

By the Commission, division 5.

[SEAL.] W. P. BARTEL, Secretary.

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 20th day of June, A. D. 1938.

No. MC 78980

APPLICATION OF HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, AND MORRIS GLICKMAN, A PARTNERSHIP, DOING BUSINESS AS CRESCENT MOUNTAIN SERVICE, BRONX, NEW YORK.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route

points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:

Between New York, N. Y., and Woodbourne, N. Y.:

From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York Highway 42 to Woodbourne, and return over the same route.

Intermediate and off-route points within 20 miles of Woodbourne.

U. S. District Court, S. D. of N. Y., Filed April 16, 1943.

(6208)